A LITTLE

TREATISE

OF

Bail and *Main-prize.*

Written, at the Request of Sir William Hayden, *Knight, by Sir* Edward Cooke.

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Bail and *Main-prize*.

CAP. I.

Whereof Bail *or* Main-prize *is derived.*

THE Word *Bail* is (as I take it) derived of the *French* Word *Bayler*, which ſignifieth to deliver, becauſe he that is bailed is, as it were, delivered, into the Hands and Cuſtody of thoſe that are his Pledges and Sureties.

This Word *Main-prize* is derived out of two *French* Words, that is to ſay *Mayne*

Mayne, which ſignifieth an Hand, and of this Word *Prize*, which ſignifieth taken, becauſe he that is taken to Main-prize, is, as it were, taken into their Hands and Cuſtody that be his Sureties.

CAP. II.

The *Deſcription of* Bayl *and* Main-prize.

BAIL or *Main-prize* is, when a Man is detained in Priſon for any Offence for which he is Baileable, or Main-prizeable by Law, is by a compleat Judge, or Judges, of that Offence, upon ſufficient Sureties bound for his Appearance, and Yielding of his Body, deliver'd out of Priſon.

This Deſcription doth as well belong to the one Word as to the other, and yet I find ſome Difference between them in our Books; and therefore for the more further and more ſpecial underſtanding of the ſame, I think it convenient for to note ſuch Differences as appears in our Books to be betwixt them.

CAP. III.

The Differences between Bail *and* Main-prize.

FIRST, He that finds [illegible] oes not find Surety only to an[illegible] hat ſpecial Matter or Cauſe whe[illegible] of he was impriſoned, but generally for all other Matters.

But he that findeth *Main-prize*, findeth Surety to appear and anſwer to that Cauſe only whereof he was impriſoned, and touching all other Matters and Cauſes he is out of Priſon. 36 *E.* 3. Tit. Mainp. p. 83.

Secondly, The Pledges and Sureties of him that is delivered to *Bail*, may impriſon him whoſe Sureties they are; for Chief Juſtice *Shard*, in the 33 *E.* 3. ſaid, that they were the Goalers or Keepers, and if they ſuffered him to eſcape, they ſhould anſwer for the ſame Eſcape. 33 *E.* 3. Tit. Mainp. 12 *Hen.* 6. 4.

Thirdly, The very Etimology of either of them doth ſhew and manifeſt the Difference betwixt them, for in the one the Priſoner is delivered by the Judge, Judges, or Courts, into the Hands, and, as it were, into the Priſon of the Sureties, for the Words be, *Traditur in Ballium.* But in the other Caſe, the Words be, that ſuch and ſuch a Man Ceperate with-

without any ſuch Delivery made by the Courtas in the other Caſe.

Now, foraſmuch as before it is ſaid that *Bail* or *Main-prize* is when a Man is detained in Priſon for any Offence for which he is *Baleable* or *Main-prizeable* by Law, & I think it expedient to ſhew what Perſons detained in Priſon were *Baileable* or *Main-prizeable*, by the Common Laws of this Realm; for I mean not to ſet down the Recognizances for *Bail* and *Main-prize*, as well becauſe the ſame are Common, as alſo for that my Deſire is to treat of ſuch Matters as are moſt material, as ſhortly, and as compendiouſly as I could.

CAP. IV.

What Perſons were Baileable *and* Main-prizeable *by the common Law.*

IT appeareth by a Statute made in the Parliament holden at *Weſtminſter* in the 3. of *E.* 1. commonly called *Weſtminſter*, 1 *Cap.* 15. that it was greatly doubted at the Common Law what Perſons were *Baileable* or *Main-prizeable*. In the Preamble of the ſaid Statute, it is ſaid, *Purceo que evaunt ceux Heures ne fuit my determine certe-in-ment queux guents ſiceront repleviſeable, et queux non, &c.*

That

... to say, Because before this ... not certainly determined who ... verifiable, or to be delivered out of Pri... and who not, &c. So as it seemeth hereby, that at the common Law at that Time, great Diversity of Opinions was touching the same, yet do they find a certain Rule set down before that time touching letting of Prisoners to Bail, for *Bracton*, who wrote in the End of the Reign of *Henry* the Third, (for so it appears in his third Book, and last Chapter) saith as follows, *In omni vero Injuria & Transgressione contra Pacem Regis nico cum adiectione Felonia solet quilibet appellatus vel rectatus perplegins demitti preterquam de Morte hominis quocunque Tempora donec imprisonatus doceat se esse Hominem*, &c. That is to say, *In every Wrong and Trespass against the Peace of the King, yea though the Offence reach to Fellony, every one that is appealed or indicted, is wont to be Bailed (except only in Case of the Death of a Man) at any Time, untill he that is imprisoned shall perceive himself guilty by Inquest.*

A Man in Execution upon a Judgment given upon a false Verdict, if he will bring an Attaint, or a Man in Execution upon an erroneous Judgment, if he will bring a Writ of Error. Or if a

Man Accountant have Auditors aſſigned unto him in Land, or in ſuch Corporation which will allow his ally. Or if a Man be taken in Execution upon a Statute, and will ſue an *audita querela*, the Party plantiff ſhall have a ſpecial Writ to let him to Bail, upon ſufficient Sureties taken, as the Caſe requireth.

f. N. 129. 1.

But of theſe, and ſuch like Bailments, my purpoſe is not to Diſcourſe; but only, and principally of ſuch Bailments as do concern Matters of the Crown. It appeareth by the Rule of *Bracton*, That a Man appealed and indicted of any matter of Fellony (the death of a Man only excepted) ought to be ſet to Bail, which Rule, as it is general, ſo hath it many Limitations and Exceptions, which ſhall the better appear, if we conſider what Perſons are not *Bailable* or *Main-priſable* by the Law.

CAP. V.

What Perſons are not Baileable *or* Main-prizeable *by the Law.*

1. & 2. Ph. & Mar.

FIRST, A Man indicted or impriſoned for Treaſon, is not *Bailable* or *Main-priſeable*, the ſame (as I take it) of Petty-Treaſon; As where the Wife killeth the Huſband; the Servant her Maſter or Miſtreſs

miſtreſs, or ſuch like. A Man indicted, appealed, or impriſoned, for the Death of a Man, is in ſome kind baileable, and in ſome caſe not, and very requiſite it is to have the Law known in thoſe Caſes.

Therefore if a Man be indicted as principal of the Death of a Man, he is not to be bailed; but if he be indicted as acceſſary before or after, he is baileable; for as *Bracton* in his ſecond Treatiſe in the third Book, *Cap.* 12. ſaith, *Ubi ille de facto non eſt replegiabilis ille de fortia per Plevianam vel Balium demittatur donec ille de facto ſe defenderit vel non defenderit quia ubi factum ibi poterit eſſe forcia quandoque ſed nunquam forcia ſine facto.*

And yet it appeareth by a Book Caſe in 28 *E.* 3. *f.* 94. That if two be indicted, the one as principal, and the other as acceſſary to the Death of a Man, after the principal be attainted, that is to ſay, have Judgment of Death, or be outlawed, the Acceſſary ſhall not be baileable; which agreeth with the ſaid Opinion of *Bracton*, viz. *Donec illo defenderet ſe de facto vel non defenderet:* But all this is to be underſtood in caſe of Judgment, at the Suit of the King; for in an Appeal of Murther, or Death of a Man, the Law altereth in ſome Caſes.

And therefore in an Appeal of Mur-

ther, ſometime the Defendant hath been let to Bail, altho' he have been appealed as principal, and ſometimes Bail hath been denied him, as appeareth by our Books, and therefore it ſeemeth to reſt much in the Diſcretion of the Court, upon due Conſideration had of the Manner and Circumſtances of the Offence, whether in that Caſe he is to be bailed or not, except you will ſay, with the Opinion of the Book, in the 21 of *E.* 4. That the Appealer in that Caſe being neither indicted before the Coroner, or otherwiſe, may be bailed; whereby it appeareth, that if the Appealer in that Caſe had been indicted thereof, they could not then have bailed him, which ſeemeth unto me (*ſine Puidicio melioris Sententiæ*) to be a very reaſonable and diſcreet Opinion, and worthy to be followed, and therefore may all our former Books which ſeemed to be repugnant one to the other, be reconciled, and ſtand well together.

In an Appeal of the Death of a Man againſt two, the one as principal, the other as acceſſary, albeit the Principal be attainted, the Acceſſary may be let to Bail, but otherwiſe it is in the Caſe of Judgment, as is aforeſaid.

E. 3, 17. Principal and Acceſſary.

A Man indicted or appealed of Manſlaughter may be bailed.

A Man indicted or appealed for Rape, he may be bailed, yet was no Felony at the Common Law untill the Statute of *Weſtm.* 2. *Cap.* 34. Rape. 44 *E.* 3. 38.

A Man indicted for Burglary may be bailed, as it appeareth by the Books in the 29th Aſs. p. 44. Burglary. 44 *E.* 3. 38.

A Man indicted or appealed of Robbery, may be bailed. Robbery.

A Man Out-law'd and Impriſoned, ought not to be bailed. *Weſtminſter* 1. Cap. 15. Out-lawry.

A Man indicted as acceſſary, for the receipt of any Perſon Out-lawed, or otherwiſe Attainted of a Murther or Fellony, is not bailable. Acceſſary.

He that is Abjured the Realm ought not to be bailed. Abjured. *Weſtm. Cap.*

If a Man be indicted, and doth become an Approver, he ought not to be bailed. Approvet.

If a Man commit Fellony, and be taken in the Manner, he ought not to be bailed. *Weſtm.* 1. *Cap.* 13.

If a Man be indicted, or impriſoned for any Fellony whereof he is bailable, yet if he break the Priſon, and after be taken again, he ought not to be bailed. Priſon-Breaker.

If a Man be indicted of Manſlaughter, Robbery, Rape, Burglary, Fellony, or any other Offence wherefore he is bailable, yet if he be an infamous and notorious Thief, and ſo openly and commonly eſteemed, *Weſt.* 1. *Cap.* 13. *Weſtm.* 1. *Cap.* 15 *de le breiſe de Manucaptione en le Regiſter Conſpiracie.*

teemed, Bail may be deny'd him by the Law.

A Man indicted for Conſpiracy, that is to ſay, That he, with others, Conſpired falſely to indict another of Murther or Felony, by means whereof he was indicted, and afterwards lawfully acquitted, ſhall not be bailed.

And this was the Reſolution of all the Judges, upon the Queſtion demanded by King E. 3. himſelf, as it appeareth by the Book Caſe, in the 27 Aſs. p. 12.

Fuch it appeareth by our Books, that a Man indicted of Conſpiracy at the ſuite of the King, *apela la vellany per Judgment*, or, as other Books term it, a *villanous Judgment*, and that is, That the Body of the Party ſo offending ſhall be taken, his Land, Tenements, Goods and Chattels ſeized on into the King's Hands; his Wife and Children to be thrown out of his Houſe, that his Houſe be raked down, his Meadows ploughed up, his Wood ſubverted and extirped; that he ſhall for ever be diſabled to give any Teſtimony, or bear any Witneſs; and as the book Caſe is, in the 24. *E.* 3. 34. That he never preſume to approach near the King's Court, *&c.* ſuch a precious Regard the Law had for the life and ſafety of the Innocent, and ſuch is the Judgment of the Common Law, againſt thoſe that unjuſtly

juſtly ſeek after the Blood of the Innocent, a Matter, in my opinion, though not directly pertinent to our Purpoſe, yet not unworthy of knowledge and memory, which may put as well the Judges as Jurors in remembrance how dear, in the Eye of the Law, the Life of a Man is, and by their puniſhment, how deeply they offend, that ſeek to Condemn the Guiltleſs, although their purpoſe doth not take effect.

But to return to our purpoſe, If a Man be appealed by an Approved, and be of good and honeſt Fame, he may be bailed, but if ſuch an one be appealed, and is not of good Fame, he ſhall not be bailed during the life of the Approver. *Weſtm.* 1. *Cap.* 15.

If a Man be indicted of any Offence whereof he may be bailed, yet if after he be found guilty of the ſame, or otherwiſe be hereof convicted, he ſhall not be bailed, and that appeareth by *Bracton*, in his ſecond Book, *Cap.* 5. whence he ſaith, *Nec ſunt illi qui culpabiles invenientur per plegias dimittendi*; that is to ſay, neither are thoſe that are found guilty to be let to Bail.

A Man indicted for Fellonies, Burning of Houſes, ought not to be let to Bail. *Weſtm. Cap.* 15. Burning of Houſes, putting out of Eyes. &c. *Epcond. Cap.*

A Man indicted for putting out Eyes, cutting out of Tongues may be bailed.

A Man taken by Certificate of the Biſhop, by a Writ of *Excommunicat. capiend.* ought not be pailed. *Weſtm.* 1 *Cap.* 15.

Chance Medley.

A Man indicted and found guilty of the Death of a Man by Miſadventure, or by caſting of a Stone over an Houſe, and by chance killing a Man, Woman, or Child, this is not baileable. 3 *E.* 3. *tit. Coronæ* 854. Like Law it is if a Man indicted be found guilty of the Death of a Man, *ſe defendendo*, he is not by the Law to be bailed; both which do agree with the Rule of *Bracton*, for *inveniuntur culpabiles*,

Se defendendo 35.

1 *E.* 3. 42.

Penal Statutes.

A Man indicted upon a penal Statute, which inflicteth any Loſs of Life or Member, as in caſe of Fellony, or otherwiſe any corporal Puniſhment, or Loſs of Goods, or Impriſonment, may be bailed upon ſufficient Sureties found, except it be eſpecially provided that the Offender in ſuch Caſes ſhall not be let to *Bail* or *Main-prize*; as for Example, If a Man be indicted of any Felonies, publiſhing of any ſeditious Books, *&c.* contrary to the Form of an Act made in the 23d Year of her Majeſty's Reign, he may be bailed, for the Offence is made Felony, and *Bail* and *Main-prize* not prohibited.

Regula. 23 *Eliz.*

But on the other Side, the Statute of

of 3 *E.* 6. *Cap.* 14. of Foreſtallers does for the firſt Offence inflict two Months Impriſonment without *Bail* or *Mainprize*, &c. in which Caſe the Party ſo offending cannot be bailed.

So as whereſoever a Statute maketh an Offence Fellony, or ſetteth down a Corporal or Pecuniary Puniſhment, for any Offence, and doth not expreſly forbid the Party to be bailed, in every ſuch Caſe (the Caſe before put for Example) the Party ſo offending, and being thereof indicted, may be bailed; but foraſmuch as all that which hath been ſaid doth extend to ſuch only as be indicted of Record, or appealed of the ſaid Offences, it is neceſſary to be underſtood what Perſons committed to Priſon for any Offence, or for Suſpicion of the ſame, may, before they be indicted or appealed thereof, be let to Bail, and what not?

CAP. VI.

What Perſons impriſoned for any Offence, or for Suſpicion of the ſame, may either by the Common Law, or by any Statute, before Indictment or Appeal brought, be let to Bail *or* Main-prize.

IT may be collected by that which hath been ſaid out of *Bracton*, That a Man committed to Priſon for any Felony, could not by the Common Law be let to Bail before Indictment or Appeal brought; for his Words be, *In omni vero Injuria & Tranſgreſſione contra Pacem Regis, imò cum Adiectione Felloniæ ſolet quilibet appellatus vel rectatus & Plegias dimitti.* So as it ſeemeth by him that he that is to be let to Bail muſt either be *appellatus vel rectatus*; therefore it ſeemeth by the Common Law, that a Man impriſoned for Fellony before Indictment or Appeal, except it were by Writt, could not be bailed: And with that Opinion ſeemeth to concur that which is declared by the Statute of *Weſtminſter*, 2 *Cap.* 15. where it is declared, that by the Common Law, a Man impriſoned by the Commandment of

of the King, or his Justices, cannot be replevied or bailed; and accordingly the Law is taken in the Book Case, 24 E. 3. 38. where a Man for going secretly armed in *Westminster Hall*, under his Apparel, was committed to Ward by the Justices, and was denied *Bail* or *Mainprize*, and forfeited his Armour; and that Person imprisoned could not be bailed; as also proved by the Statute of 1 R. 3. *Cap.* 3. where it is said, *Pur ceo que diverses Persons de jour en jour sont arrestus et imprison pur Suspicion de Felonie ascun foits de Malice, &c. et ensi gardes in Prison sans* Bail ou Main-prise *a lour grand Vexation et Trouble,* &c. whereby it is that which was before collected out of the Words of *Bracton*, but here it may be demanded what was the Reason (for *Lex plus laudatur quando ratione probatur*) that Justices of the Peace might by the Common Law bail a Man indicted for Fellony, and appealed thereof, but could not bail a Man upon Suspicion of Fellony.

Hereunto might be answered, That Justices of Peace could not bail a suspected Person of Fellony, before Indictment or Appeal, for two Causes.

First, That no Justice of Peace (for with them I will only meddle in this Treatise) is a Judge of any such Person

before Indictment or Appeal brought, and therefore could not let him to *Bail* or *Main-prize*; for it were abſurd to ſay, and directly contrary to the Etymology of the Word, that he ſhould deliver any Perſons to Bail that were not Judge of the Perſon of him that were ſo to be bailed.

The ſecond Reaſon is, For that Juſtices of the Peace are, before Appeal brought, or Indictment, no Judges of the Cauſe wherefore he is impriſoned; and therefore doth it follow, that by the Common Law they would not let ſuch Perſons to Bail. But here ariſeth a ſecond Queſtion as doubtful as the firſt; Why Juſtices of the Peace are neither Judges of the Perſon nor of the Cauſe, in the Caſe aforeſaid, before Indictment or Appeal brought?

This Doubt is fully reſolved by the Opinion of the whole Court, in 14 *H.* 8. 16. where it is ſaid, That a Juſtice of Peace is a Judge of Record, and therefore ought to precede upon that Thing which is judicially before him of Record.

But in the Caſe, before Indictment or Appeal brought, neither the Perſon nor the Cauſe is of Record, and therefore he could not before Indictment proceed

ceed either with the Perſon or with the Cauſe.

And for that very Reaſon, it is likewiſe agreed by the whole Court in that Caſe, That a Juſtice of Peace cannot make out a Warrant to arreſt any Man by Suppoſition of Fellony, before he be thereof indicted; and yet it is there agreed, that he may make a Warrant againſt one before any Record thereof, and this does nothing impugn that which hath been ſaid, *Exceptio probat Regulam.* If the Juſtice of Peace ſhould ſtay the Arreſting of ſuch Perſons as would break the Peace, before they were rectified thereof by Matter of Record, the Breach of the Peace ſhould never be prevented; for before it be broken, there cannot any Record be made thereof; and therefore in that Caſe, for that Cauſe, the Juſtice of the Peace may lawfully make out his Warrant (as commonly is uſed) tho' there be thereof no Record made: But then ſeeing by the Order of the Common Law, Juſtices of Peace could not bail a Perſon ſuſpected or impriſoned before Indictment or Appeal brought, it is very requiſite to underſtand what Perſons committed to Priſon may, before Indictment or Appeal, be let to Bail by Juſtices of Peace, by any Statute now in force.

CAP.

CAP. VII.

What Persons committed to Prison, before Indictment or Appeal, be baileable by Justices of Peace by any Statute now in Force.

AND first I take it, that the Statute that is now principally in Force, for this Matter, is the Statute of 1 E. 2. *Pb. and Mar. Cap.* 13. which Statute being long, I will not recite, but shortly shew what Persons imprisoned may, before Indictment or Appeal, be let to Bail by Justices of Peace, and what not by force of that Statute, or of any other not repealed.

Treason. A Man committed to Prison for Treason, or for Suspicion of Treason, cannot be bailed by Justices of Peace.

Petty-treason The same Law is of Petty-Treason.

Murther. If a Man be suspected of Murther, and thereupon committed to Prison, he cannot be bailed by a Justice of Peace.

But a Question may be made, Whether in that Case a Man committed to Prison upon Suspicion to be accessary to Murther, whether he, before Indictment, may be let to Bail by the Justices of Peace; and I think (*sine prejudicio me-*

foris Sententiæ) that he cannot be bailed by them by Force of the ſaid Statute; for albeit after Indictment he may be bailed, as aforeſaid, yet me ſeemeth that the ſaid Statute does not extend to make him baileable by the Juſtices of Peace before Indictment, for the Words of the Statute be, *Any Perſon or Perſons arreſted of Manſlaughter or Fellony*; under which Words (as I take it) the Meaning of the Makers of the Statute was not to include either Murderers or Acceſſaries.

It appeareth by the expreſs Letter of the Statute, that a Man committed to Priſon for Manſlaughter, or for Suſpicion of the ſame, may be bailed. But the Doubt is, what Offences be included within this Word *Fellony*, within the Meaning of the ſaid Statute, and therefore it is neceſſary to underſtand what is comprehended under the ſame. Manſlaughter. Doubt.

If a Man be committed to Priſon for the Fellonious Burning of Houſes, or for Suſpicion of the ſame, yet he ought not to be let to Bail within that Statute. Burning of Houſes.

But a Man committed for Burglary, or for Suſpicion of the ſame, may, as well before as after Indictment, be let to Bail within the Meaning of that Statute. Burglary.

Breaking of Priſon.

A Man impriſoned for Fellony, or for Suſpicion of the ſame, doth break Priſon, and afterwards is apprehended, and therefore committed to Priſon, he ought not to be bailed neither before nor after Indictment.

Robbery.

A Man committed to Priſon for Robbery, or for Suſpicion of the ſame, may be let to Bail as well before as after Indictment.

Notorious Thief.

And yet he that is a notorious Thief, and ſo commonly eſteemed, if he be impriſoned for any Offence touching the Crown, or for any Manner of Fellony, is not baileable within the Meaning of the ſaid Statute.

Rape.

A Man impriſoned for Rape, or for Suſpicion of the ſame, is baileable as well before Indictment as after, (as I take it.)

Appeal by Approver.

A Man that is appealed by an Approver, except he be of good and honeſt Fame, ought not to be bailed during the Life of the Approver.

Acceſſary to a Felon attainted.

A Man impriſoned for being Acceſſary to the Receiving or Abetting of any Perſon out-lawed, or otherwiſe attainted for Murther or Fellony, is not baileable either before or after Indictment.

Putting out of Eyes.

A Man impriſoned for putting out of Eyes, or Cutting out of Tongues, or for Suſpicion of the ſame, is baileable (as I take

ke it) as well before as after Indictment, by the Juſtices of Peace, by force of the ſaid Statute.

If a Man commit any Offence, hereof he is baileable; yet if he be taken in the Manner, the Juſtice of Peace may deny him Bail as well before as after Indictment, for he is not baileable. Taken with the Manner.

Contrarily; A Man impriſoned for any Offence which by any ſpecial Statute is made Felony, may be bailed by the Juſtice of Peace, except Bail be expreſly prohibited by the ſame, as well before as after Indictment.

As for Example; It is propounded by the Statute 3 *H.* 7. *Cap.* 2. That if any Maid or Widow having Lands, Goods, or Tenements, or being Heir apparent to their Anceſtor, be taken away contrary to their Will, and afterwards married to ſuch Miſdoer, *&c.* or defiled, *&c.* that ſuch Offence is Felony: Now if a Man be impriſoned for ſuch Offences, or for Suſpicion of the ſame, he is baileable by the Juſtice of Peace as well before as after Indictment, *Sunt talia plura quæ omnia enumerare prolongum eſſet ſed iſta ſufficient. exempti Cauſa.*

A Queſtion may be here demanded, Whether the ſaid Statute of 1 *&* 2 *Ph. & Ma.* do extend to Fellonies made by

the Stat. ſince the ſaid Act; and I think, without any great Doubt, it doth, for (as I take it) that any Perſon ſuſpected or impriſoned for any Fellony made by an Act of Parliament, either before or ſince the ſaid Act of 1 and 2 *Ph. & Ma.* may be let to Bail by the Juſtices of Peace, unleſs Bail and Main-prize be expreſly therein prohibited.

But ſince ſuch Perſons as are baileable by the ſaid Sttute 1. and 2. *Ph.* and *Ma.* are to be let to Bail by Juſtices of Peace upon ſufficient Sureties found, it is neceſſary to be underſtood how many and what Juſtices are requiſite, and how many Sureties or Pledges are required by the Law, upon the letting of ſuch Perſons to Bail.

CAP. VIII.

How many and what Juſtices of the Peace are requiſite, and how many Pledges, or Sureties, are required by the Law.

THE Juſtices of Peace in open Seſſions of the Peace, or two of the Peace, whereof the one to be of the Quorum, both being preſent together, may out of the Seſſions let any Perſon impriſoned

ſoned (baileable) to Bail, which Bailement in Writing ſubſcribed or ſigned with their own Hands, they ought to certify the next general Seſſions to be holden within the ſame County. But if a Man be indicted by Proceſs, and impriſoned, *&c.* he may be let to Bail by any Juſtice of Peace by the Common Law.

Fitz. Nat. Brevium a 113.

It appeareth by *Bracton*'s Treatiſe of his 3d Book, Cap. 8. That at that Time he that was to be bailed onght to have found 12 *Probos & Legales homines de Cond*, &c. and ſo it appeareth by an antient Book called, *The Diverſity of Courts*, Fo. 116. 8. that in antient Time he that could wage his Law, ſhould have twelve Men with him: So as it ſeemeth that all that Time, as well Wagers of Law, as in Caſe of Bail, the Law is changed ſince that Time (I take it) there ought to be two Pledges, or Main-prizers, at the leaſt, for me ſeemeth that the Words *Manu cap.* is a ſufficient Proof thereof, for the Words be, *Et licet frequenter abtulerit ſufficientes Manu captores qui enim Manu caperent*, &c. So as there muſt be ſufficient Manucaptors, and that cannot be unleſs there be two at the leaſt, and (as me ſeemeth) it may be alſo collected by the Book in the 33 *E* 3. and 26 *E.* 3. there it is ſaid, *Ils ſont ſes gau-*

There ought to be two Pledges.

ders & ils rendera del eſcape: And again one ſuch Manucapter; but here a Queſtion may ariſe, How often for one Offence a Man may be let to Bail.

CAP. IX.

How often for one Offence a Man may be let to Bail.

IF a Man be impriſoned, indicted, and appealed, for any Offence for the which he is baileable, and is accordingly let to Bail, and afterwards make Default, and doth not appear according to the Condition of his Bail, and his Mainprizers Recognizance, and afterwards is arreſted and apprehended again, in this Caſe the Juſtice of Peace may deny him any more to be let Bail or Main-prize, and that this ſhould be ſo, it is proved by the Book Caſe, 2 *H.* 4. Fo. 24. by the Opinion of all the Juſtices, where it is ſaid in the like Caſe, *Que il ne ſerra my per Mainpriſe apres.*

But becauſe it may fall out that to be let to Bail may be denied to him that is baileable by the Law, it is good to ſee what Remedy the Law hath provided for the Priſoner ſo detained in Priſon to be let to Bail

CAP. X.

What Remedy a Man in Priſon, and baileable by the Law, hath to be let to Bail.

HE that is impriſoned for any Offence whereof he is baileable by the Law, may have a Writ *de Manucaptione* directed to the Sheriff of the ſame County, that he ſhall take Surety of him to appear, and to let him at large, which Writ in divers Forms, and in divers ſpecial Caſes, appeareth in the Regiſter.

If a Man be wrongfully detained in Priſon, he may have a Writ *de Homine replegiando*, which doth alſo appear in the Regiſter.

It appeareth by *Bracton*, that in his Time there was a Writ in Uſe for this Purpoſe, which was called a Writ *de Odio & alio*, touching which, the Words be theſe, *Sed cum inquin eſt quod innocentes ſicut illi qui criminoſi non ſunt diu incluſi ditineantur in Carcere, ideo ad Lacrimoſam querelam Parentum & Amicorum de Gratia Dom. Reg. fieri ſolet Inquiſitio utrum hujuſmodi impriſonati de Morte Dominis culpabilis eſſent de Morte illa vel de hujuſmodi Requiſitione milli debet*

devagari.

devagari. And there ſetteth down the Words of the Writ: Now it is to be underſtood that at that Time when *Bracton* wrote, and ſo long Time after, the Sheriff, by Writ, or Commiſſion to him directed, uſed to take Injuries and Judgments of Murther and Fellony, and to hold Pleas of the Crown, which afterwards being denied unto him by the Statute of 28. *E.* 3. *Cap.* 2. (as I take it) *de odio & alio* hath loſt its Force.

But here a Queſtion may be demanded, whether a Man committing any Offence upon the Sea, or within the Juriſdiction of the Admiralty, for which, if the ſame had been committed upon the Land, he might have been bailed, Whether the Commiſſioners of the Admiralty may let him to Bail or no before or after Indictment?

CAP. XI.

In what Caſe Commiſſioners of the Admiralty may let Priſoners to Bail, either before or after Indictment.

AND firſt, I take it (*ſine Prejudicio melioris Sententiæ*) that the Commiſſioners of the Admiralty cannot let to Bail any Perſon impriſoned for any Of-

or Suſpicion thereof, committed on Sea, or within the Juriſdiction of Admiralty, before the Perſon ſo impriſoned be thereof indicted, although in that Caſe, if the Fellony or Offence had been done upon the Land, the Party had been baileable, and I am induced to be of that Opinion for the Conſideration following.

Firſt, it is to be agreed that before the Statute 28 *H.* 8. *Cap.* 13. Piracies, Robberies, and other Offences done upon the Sea, were determined by the Civil Law, which Law was in that Behalf found very defective, foraſmuch as by the ſaid Law, none of the ſaid Offences ſo committed could be puniſhed without the Teſtimony of two competent Witneſſes, or expreſs Confeſſion of the Party offending, and thoſe dangerous and deteſtable Offences, as well for the want of ſufficient Teſtimony (Murther being the Shadow of Piracy) as alſo by reaſon of the perverſe and obdurate Obſtinancy of the Offender (an Incident inſeperable to the Pirate, in not confeſſing of his own Offence) he commonly went away without Puniſhment; this Miſchief was remedy'd by the Statute 18 *H.* 8. *Cap.* 13. whereby it is provided that all Treaſon, Fellony, Robberies, Murthers, and Confederacies, after the ſaid Act, committed

mitted in or upon the Sea, &c. shall
enquired, heard, tryed, determined, a
judged, in such Shires and Places of th
Realm as shall be limited by the King
Commission, to hear and determine such
Offences after the Course of the Law o
this Land, as if the same Offences had
been committed upon the Land within
the same Shire: Of this much I gather,
that hitherto the said Offenders were
not baileable, neither by the Common
Law, nor by any Statute; for how
could they be baileable by the Common
Law, when the Offence was not deter-
minable by the Common Law; and I
find no Statute that taketh away the
Tryal of those Offences from the Civil
Law untill the Stat. 28 *H.* 8. which
Statute does not make any Provision at
all for letting the said Offenders to Bail;
therefore I do conclude that without
any great Doubt, as me seemeth, such
Offenders before Indictment were not
baileable before the Commissioners, nei-
ther by the Common Law, nor by the
Statute 28 *H.* 8.

But it may be demanded why the
said Statute of the 1. and 2. of *Ph.* and
Ma. should not extend to those Commis-
sioners also; for within the Admiral's
Jurisdiction, they also are Justices of
Peace? This Question is easily resolved,

as

[illegible] doth not ex-
[illegible]oners for the Ad-
only those which are com-
for the Peace for the Body of
ounty, which, as by divers other
of the said Act, so doth it plainly
by that which is therein provided,
and in Case any Justice of Peace,
should offend, &c. that the Justices
the Goal Delivery for the Shire, &c.
such Offences shall happen to
committed, shall for every such Of-
set a Fine, &c. whereby it is evi-
that the said Statute is meant only
end to Justices of the Peace, within
ody of the said County: But I take
ter Indictment, the Commissioners
the Admiralty may let to Bail such
ons as are baileable by the Law, be-
they being Judges of Record, are,
er Indictment, Judges as well of the
on offending, as of the Offence it
and therefore may deliver such
ons so indicted in *Ballium* (I take it.)
And what Persons are baileable by the
Law, and what not, may appear by
that which hath been said before; this
only I will observe in this Place, that
seeing Murther is such an Incident to
racy, I think that the Commissioners

of the Admiralty may well deny f
Perſons as are indicted of Piracy to
let to Bail or Main-prize, as well
the Heinouſneſs of the Offence, as
the Affinity it hath with Murther,
Offenders wherein (as is aforeſaid)
not baileable.

CAP. XII.

How, or in what ſort, Bail *or* Ma
prize *may be diſcharged.*

IF the Juſtice of Peace does let a
Priſoner that is baileable to Bail, a
afterwards as well the Priſoner, by
Writt of *Habeas Corpus*, as the Reco
of the Indictment, be removed by
Writt of *Certiorare* either into t
Chancery, or into the *King's-Bench*, t
Bail or Main-prize taken by the Juſtic
of Peace is diſcharged for ever. As
is holden in 32 *H.* 8. tit. Mainp. yea a
though the Record be remanded by
Procedendo, as it is then likewiſe holde
Mr. *Statham* does report a Caſe in
R. 2. That after Indictment given, &
the Main-prizers are diſcharged; and it
is not holpen by the Statute of 1 *E.* 6.
Cap. 7. (as I take it.

If the Proceſs upon any Indictment be
diſcontinued, the Main-prizers are diſ-
charged.

ed, (as I take it) and if the Party
the Main-prizers are discharged,
lors omnia solvit, & Impotentia ex-
Legem, as *Bracton* saith: But at
Day of Appearance the Party's
h cannot be pleaded by the Main-
ers, but upon Process against them,
ust come in by the Return of the
iff, as it is holden, and then also
the *Main-prizers* plead the same (as
it) in Discharge of the Recogni-
. And of this matter so much
suffice.

CAP. XIII.

Conclusion: *With Advertisement.*

HE End and Scope of this little
Treatise is (under Correction
ose better Judgment) to set forth
the Law of this Realm doth re-
touching Bail and Main-prize; a
ary Thing in mine Opinion for
as be Justices of the Peace to be
n; for as he that standeth on plain
ure Ground, although he should be
by Rage of Tempest to the
und, yet might he without Danger
of himself again. So he that hath
Administration of Justice, and in all

his Actions is guided and directed
the Rule of the Law, neither abu
his Authority, nor exceeding his C
miſſion, ſtandeth on a ſure Grou
which will bear him up at all Seaſo
Sapientis eſt cogitare (ſaith *Cicero*)
tum ſibi eſſe promiſſum quantum ſit C
miſſum & Creditum. And good was
Council (as thoſe that follow it in
whoſoever gave it, *viz. Exceed not*
Commiſſion: And albeit it is truly
that *Judicium eſt Legibus, & non*
emplis; and as the Logician ſaith,
empla demonſtrant, non probant, yet u
doubtedly it is a great Contentment a
Satisfaction to an honeſt Mind, and
good Conſcience, eſpecially in Caſes th
concern the Life and Liberty of a Ma
to follow the Preſident and Example
grave and reverend Men; Howbeit
as much as all good Laws are inſtitut
and made for the repelling of thoſe
vils that moſt commonly happen, for
ea quæ frequentius accidunt Jura ad
tantur, and principally do reſpect the
neral Peace and Profit of the Peop
and therefore we uſe to ſay, that a M
chief is rather to be ſuffered than an
convenience; that is to ſay, It is bet
that a private Perſon ſhould be puniſh
or damnified by the Rigour of the La
than a general Rule of the Law ſho

broken, to the general Trouble and Prejudice of many; it is therefore very neceſſary that the Law and Diſcretion ſhould be *Concomitanta*, and the one to be an Accident inſeperable to the other, ſo as neither Law, without Diſcretion, left it ſhould incline to Rigour, nor Diſcretion without Law left Confuſion ſhould follow, ſhould be put in Ure; my Meaning hereby is not to allow of any Man's Diſcretion that ſitteth in the Seat of Juſtice, for that would bring forth a monſtrous Confuſion; but I mean the Diſcretion that ariſeth upon the right Diſcerning and due Conſideration of the true and neceſſary Circumſtances of the Matter. And as we commonly uſe to ſay, that Common Law is nothing elſe but Common Reaſon, and yet we mean hereby nothing leſs than that Common Reaſon wherewith a Man is naturally endued, but that Perfection of Reaſon which is got by long and continual Study; ſo in Aſſociating Diſcretion ſo near to Law, is not meant to preſer unto that Society each Man's Diſcretion, which commonly rather deſerveth the Name of Affection and Self-will, than of Diſcretion; indeed, but that Diſcretion only we allow of in this Place, that either grave and reverend Men have uſed, in ſuch Caſes before, or Riſe of the Circumſtances

cumſtances of the Matter (as is aforeſaid :) As for Example, being not alſo impertinent to the Matter of our Treatiſe, if it were a Queſtion, Whether in an Appeal of Maim, the Defendant were to be let to Bail or Main-prize or no? It is neceſſary to be examin'd, whether the manner of the Mayme were horrible or heinous, for the Defendant may be denied Bail or Main-prize, whether the ſame were ſuddenly done, or upon a ſuddain Affray, or of the Plaintiff's Aſſault, or againſt the Intent of the Defendant, &c. for the Defendant may be let to Bail; and this I take to be a lawfull Diſcretion, for to that End is the Reaſon of the Book, in 6 *H.* 7. *fo.* 2. where in an Appeal of Mayme, the Juſtices of the Kings-Bench denied the Defendant to be bailed, for that upon Examination of the Matter, it appeared to be moſt cruel and horrible; and therefore in reſpect of the abominable Heinouſneſs of the ſame, the Juſtices would not ſuffer the Defendant to be bailed; and with this agreeth the Opinion of *Bracton* in the ſecond Treatiſe of his 3d Book, *Cap.* 8. *Appellati vero de Morte Hominis & de Pace & Plagis Periculoſis ſaltem capiantur & impriſon. detrudaliter & ibi cuſtodiantur donec per Dominum Regem per Plegios demittantur vel per*

indicem

eem deliberentur, &c. whereby I note
he saith *Plagæ Periculosæ*, insinua-
a Difference *inter Plagas Periculosas*
minus Periculosas; in that he saith,
es per Dominum Regem per Plagias
tantur, it is to be understood untill
that Court where the Offence is to be
mined and judged, they be let to
: And this Particular may suffice to
Reason of the General.

To conclude: *The Author of all Wis-
and true* Knowledge *though he neverthe-
that those that were Judges of the Earth
ld be both Wise and Learned, submit
beseech to bless all those that on Earth
bath set on his own Seat, with his true
owledge and Wisdom.*

FINIS.

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